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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA,
Petitioner,

v.

DWIGHT F. DAVIS, Secretary of War of the United States, Successor to JOHN W. WEEKS, Secretary of War of the United States, COL. T. Q. ASHBURN, Chief Inland & Coastwise Waterways Service of the United States, and JAMES E. CARROLL, United States District Attorney,
Respondents.

No. 718.

PETITIONER'S REPLY BRIEF.

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Solicitors for Petitioner.

St. Louis Law Printing Co., 415 North Eighth Street. Central 4477.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1925.

EDWARD F. GOLTRA, Petitioner, v. DWIGHT F. DAVIS, Secretary of War of the United States, Successor to JOHN W. WEEKS, Secretary of War of the United States, COL. T. Q. ASHBURN, Chief Inland & Coastwise Waterways Service of the United States, and JAMES E. CARROLL, United States District Attorney, Respondents.	No. 718.

PETITIONER'S REPLY BRIEF.

Page eight (8) of brief of respondents quotes one paragraph of the bill of complaint, and in so doing certain phrases are italicized.

We take this means of calling the Court's attention to the printed transcript of record in this case for the pur-

pose of stating that the clerk of the court below erred in printing the bill of complaint, in that the bill of complaint does not emphasize any word or phrase, and that the words and phrases printed in italics is error. A certificate of the Clerk of the United States District Court is printed and hereto attached, the original of which has been filed with the clerk of this court.

The hurriedly drawn bill, as a whole, makes no admissions as claimed by the respondents, but, on the contrary, the bill, the facts and the circumstances emphasize the fact that the intention of the Secretary of War was to control the rates to be charged, and that he arbitrarily placed restrictions upon the petitioner herein to prevent competition with the Federal Barge Line operated under the respondents, the Secretary of War and Col. Ashburn. The facts further disclose that the petitioner herein was afforded no opportunity to even operate under the restrictions imposed, for the reasons that the boats and barges were in his possession about seven and one-half months, and during that period he was unable to operate for at least three and one-half months on account of the closed navigable season, and for other periods of time consumed in experimental work and making the newly designed equipment adaptable for use on the Mississippi River and its tributaries. Although restricted as indicated, the petitioner did operate the fleet.

I.

The case cited by respondents under point I of their summary of points and authorities and referred to in their argument on page 16 of their brief, viz., Cunningham v. Railroad Company, 109 U. S. 446, has no application here.

That was an action to foreclose a mortgage on real estate, the title to which was in the State of Georgia.

II.

An examination of the cases under point II, cited by the respondents, are similar to the case of Cunningham v. Railroad Company, supra, and are not applicable to the case under consideration.

With the following exceptions the cases cited are referred to in petitioner's original brief:

Hagood v. Southern, 117 U. S. 52, was an action to compel state officers to levy taxes.

Goldberg v. Daniels, 231 U. S. 218, was a suit by a bidder to compel the Secretary of the Navy to deliver a condemned cruiser belonging to the United States which had been advertised for sale.

The facts in the case of Belknap v. Schild, 161 U. S. 11, disclose that this was an action to enjoin officers of the United States from using a caisson gate which had been purchased and paid for by the United States and was in possession of the United States.

In the case of New Mexico v. Lane, 243 U. S. 52, the

State of New Mexico undertook to establish title in it to certain land, the title to which was in the United States, and to restrain the Secretary of Interior from disposing of the property.

The case of Louisiana v. Garfield, 211 U. S. 70, was a suit to establish title to real estate in an abandoned military reservation of the United States.

In Leather v. White, 296 Fed. 477, a minority stockholder sought to recover back certain real estate which had been transferred to the United States.

IV.

None of the cases cited by respondents under point IV has any application to the question involved under that point.

The evidence referred to under this point is the letter of cancellation signed by Lansing H. Beach, Major General, Chief of Engineers, dated April 27, 1923 (Rec., p. 90). The lower court properly refused to allow this letter to be introduced.

This purports to be a letter by the Chief of Engineers, the lessor named in the lease contract, addressed to Mr. Goltra, and undertakes to terminate the lease contract in practically the language used in a similar letter dated March 3, 1923, signed by John W. Weeks, Secretary of War (Rec., p. 67).

In this connection, it will be noted that the seizure took place March 25, 1923, and the bill of complaint was filed

March 25, 1923. The returns of the respondents had been filed on April 17, 1923, and prior thereto, and the motions to dismiss and quash, filed on April 17, 1923, had been presented and were under submission, at the time the Chief of Engineer's letter of April 27, 1923, was written and served on the petitioner herein on April 30, 1923 (Rec., p. 88), the very day the District Court overruled the motions to dismiss and quash (Rec., p. 44).

This was clearly an afterthought of the respondents. Although it was properly rejected as evidence in this case, the respondents see fit to refer and comment thereon as if it were a part of this record.

While the letter is not considered as evidence, but since respondents comment upon it, may we not call attention to the fact that they recognized the correctness of the interpretation placed upon the contract of lease by the Chief of Engineers as the Chief of Engineers being the lessor referred to in the contract, and particularly in clause 8 of said contract.

The Chief of Engineers being the party to the contract had the right to interpret the same, and by his acts and conduct he had the right to declare the meaning of the contract from the lessor's point of view.

United States v. Mason & Hanger Co., 260 U. S. 323.

If the Chief of Engineers was and is the lessor under Clause 8 of the contract, then he was the only party who could exercise any power or authority, if any power or

authority, as contended by respondents, is given in that clause or paragraph.

Sanborn, Circuit Judge, in his dissenting opinion in this case, covers this point in the following language (Rec., p. 138):

> "It will be noticed that the only condition that would justify the termination of the lease and the return of the property to the lessor was the noncompliance by the lessee in the judgment of the lessor Black with the terms of the lease, while the defendants' claim to possession rests on noncompliance in the judgment of Honorable John W. Weeks, Secretary of War. The large value of the property subject to this lease and contract, the serious effect of the decision to be rendered by the judgment of Mr. Black leave no doubt in the mind of the writer that the plaintiff entrusted this decision to and relied upon the individual wisdom, experience, knowledge, just and deliberte fairness of Mr. Black. The record does not disclose any decision of this question of noncompliance by him or any consent or agreement by the plaintiff to substitute the judgment of Honorable John W. Weeks, Secretary of War, or of any other person or officer for that of Mr. Black; and it seems to the writer that the judgment of Mr. Weeks, the Secretary of War, was not binding upon the plaintiff, was unauthorized and ineffective. When two opposite parties agree to submit a controversy between them to the judgment of a chosen arbiter in whose fairness, wisdom, deliberation and discrimination they have confidence and to abide by his decision, the con-

sent and agreement of both is indispensable to the substitution of another individual as arbiter in his place."

In addition to the foregoing, we desire to quote from Sugden on Powers, page 266:

"So, wherever a power is given over real or personal estate, and whether the execution of it will confer the legal or only the equitable right on an appointee, if the power repose a personal trust and confidence in the donee of it to exercise his own judgment and discretion, he cannot refer the power to the execution of another."

V.

Under point V respondents cite a number of cases, all of which originated in the Court of Claims upon specific and express provisions in contracts mutually agreed upon, without ambiguity, wherein one party was designated as the sole arbiter, judge or inspector, whose decision was agreed to be final and binding. All of these were building or construction contracts or agreements of similar import. A short reference to each case will show that the same has no bearing upon the issues in this case, which issues are more fully discussed in our original brief.

Kihlberg [illegible]nited States, 97 U. S. 398, was a claim under contract to transport military, Indian and Government stores. The contract expressly gives to the Chief

Quartermaster the sole power and authority to ascertain and fix the distance to govern in the settlement of the contractor's accounts.

In Sweeney v. United States, 109 U. S. 618, the Court had under consideration a claim for the construction of a brick wall at the National Military Cemetery. The parties mutually agreed, in contract, to an inspector whose certification was to be final. In this case, the inspector had condemned brick during the period of construction. The contractor used the condemned brick after rejection. The inspector refused to certify upon completion.

Time was of the essence of the contract for excavation on a canal in the case of United States v. Gleason, 175 U. S. 588. The parties to this contract designated the Chief of Engineers with final power to terminate the contract. The terms and conditions were definitely and clearly set forth. There were several extensions granted. The contractor failed to comply and never did complete the work.

The case of United States v. Mason & Hanger Co., 260 U. S. 323, grew out of a contract, in the nature of "cost-plus," for the erection of buildings at Camp Zachary Taylor. The contract provided for monthly statements of the elements of costs, upon which, if there be any disagreements, the decision of the contracting officer "shall govern."

No possible construction can be placed upon the contract in question which would cause it to be read as an

unambiguous right, power and authority to the Secretary of War or the Chief of Engineers to arbitrarily cancel the same. Even if such strained construction could be placed on the terms of the contract, such action could not be had "upon mere guesses and surmises without information or knowledge on the subject."

United States v. Barlow, 132 U. S. 271.

The lessor placed his own construction on clause 8 of the contract as an "Inspection" provision. There is no evidence that an inspection was ever made, and no evidence to the effect that any effort was made to secure direct knowledge of the conditions. On the contrary, Mr. Goltra, in his letter of March 8, 1923 (Rec., p. 69), stated:

> "The exercise of your judgment is, I am convinced, based upon inadequate and inaccurate information and has in fact no substantial basis on which to rest. This I believe will be fully demonstrated to you if I am granted a fair and impartial hearing to which, as a citizen, I am entitled, and which, in fairness and justice, I now request."

VI.

Respondents, under point VI, undertake to refute the argument of petitioner that the United States was not acting in its sovereign capacity, nor in a governmental capacity, but as a trader engaged in a commercial enter-

prise, and rely upon North American Com. Co. v. U. S., 171 U. S. 110, and U. S. v. Bank of Metropolis, 15 Pet. 392.

In the case of North American Com. Co. v. U. S., the United States sought to recover rentals and taxes under a lease executed by the Secretary of the Treasury under certain acts of Congress for the protection and preservation of fur-bearing animals on the islands of St. Paul and St. George in Alaska, "a special reservation for Government purposes." There was and is no dispute about the United States acting in its sovereign and governmental capacity by exercising its power to regulate the seal fisheries in the interest of the preservation of the species, but the case has no application to the case under consideration.

The same may be said of the case of U. S. v. Bank of Metropolis. On the contrary, the Court, in that case, holds that where the departments of the Government accept drafts, unconditionally, the United States assumes the same liability as private parties in commercial paper transactions.

Respectfully submitted,

JOSEPH T. DAVIS,
DOUGLAS W. ROBERT,
Solicitors for Petitioner.

ADDENDA.

United States of America,
Eastern Division of the Eastern
Judicial District of Missouri. } ss.

In the District Court of the United States Within and for the Eastern Division of the Eastern Judicial District of Missouri.

Edward F. Goltra,
Plaintiff,
vs.
John W. Weeks, Secretary of War of the United States, Colonel T. Q. Ashburn, Chief Inland and Coastwise Waterways Service of the United States, and James E. Carroll, United States District Attorney,
Defendants.

In Equity.
No. 6339.

I, Jas. J. O'Connor, Clerk of the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri, do hereby certify, that upon an examination of the records of this court in the above-entitled cause, it is disclosed that this office in the preparation of the transcript of record on appeal of defendants to the United States Circuit Court of Appeals for the Eighth Circuit inadvertently showed certain designations and matter in the bill of complaint to be in italics, more specifically the following, as same appear in the printed record on such appeal at the pages indicated, to wit: "Secretary of War" and "satisfaction of the lessor," appearing on page 5; "Secretary of War," ap-

pearing twice on page 6; "United States," appearing partly on page 6 and partly on page 7; "Secretary of War," appearing twice on page 7, and "the lessor" and "approval of the lessor," also appearing on said page 7; "Secretary of War," appearing twice on page 8 and "the lessor," appearing three times on said page 8; "United States," "the lessor" and "his judgment," appearing on page 9; "lessor" and "being the United States," appearing on page 18. That such designations and matter, as aforesaid, is not italicized in the original bill of complaint on file in said cause.

In witness whereof, I hereunto subscribe my name and affix the seal of said court at office in the City of St. Louis, in the Eastern Division of said District, this 23rd day of April, A. D. 1926.

JAS. J. O'CONNOR,
Clerk.

(Seal)

By JOSEPH M. WALSH,
Deputy Clerk.